IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v. **Crim. Action No. 1:18-cr-54**
(Judge Kleeh)

TERRY WILLIE TRAPP,
OSCAR AARON WATKINS, and
DOUGLAS CHARLES KNICELY,

Defendants.

ORDER REJECTING THE MAGISTRATE JUDGE'S REPORT & RECOMMENDATION [DKT. NO. 105] AND DENYING DEFENDANTS' MOTIONS TO SUPPRESS [DKT. NOS. 58, 61]

Pending before this Court are two motions to suppress filed by Defendants Douglas Knicely and Oscar Watkins. The government filed responses to each. The motions were referred to United States Magistrate Judge Michael J. Aloi, who held a combined hearing on January 29, 2019. After the hearing, the government and Mr. Knicely filed supplemental motions. The Magistrate Judge then issued a Report and Recommendation ("R&R"), recommending that the motions be granted. The government filed an objection to the R&R, and Mr. Watkins and Mr. Knicely filed responses to the objections. For the reasons set forth below, Court hereby **REJECTS** the Magistrate Judge's R&R (Dkt. No. 105) and **DENIES** the pending motions to suppress (Dkt. Nos. 58, 61).

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I. BACKGROUND

On October 9, 2018, at 1:30 a.m., Morgantown Police Officer Zane Breakiron conducted a security check at the Euro Suites Hotel in Morgantown, West Virginia.[1] As he drove by, he noticed a Dodge Ram pickup truck in the hotel's rear parking lot with its tail lights on. He pulled into the parking lot next to BB&T Bank, turned off his lights, and watched the vehicle for several minutes. He noticed the interior lights shut off. He then witnessed a male leave the hotel, walk to the passenger side of the truck, and enter the vehicle. Officer Breakiron indicated in his report that "[t]he Morgantown Police Department has responded to various calls for criminal activity in the past" at the Euro Suites Hotel. He has, himself, "found several needles and other drug paraphernalia in the parking lot" in the past and has also received "calls to service" regarding drug use in the parking lot.

After watching the vehicle for several minutes, Officer Breakiron decided to approach. He turned on his headlights, drove into the hotel's parking lot, and parked his car catty-corner to the truck, leaving space for the parked truck to back out and exit. On his way in, he called in a suspicious vehicle.

[1] The Euro Suites Hotel is located at 501 Chestnut Ridge Road in Morgantown, Monongalia County, West Virginia.

He did not turn on his blue lights. He then exited his marked cruiser and walked to the driver's side of the truck. The window was down when he reached the door. He spoke with the two men sitting in the vehicle, introduced himself, asked what they were doing, and asked for their identification. He learned from their drivers' licenses that they were Douglas Charles Knicely of West Virginia and Oscar Aaron Watkins, Jr., of Pennsylvania. According to Officer Breakiron's report, Mr. Knicely's hands were shaking when he handed over his license, and both individuals' eyes were glassy and bloodshot. Officer Breakiron says that when he approached, he immediately smelled marijuana emitting from inside the vehicle.

After Officer Breakiron asked the men how they knew one another, they said they knew each other from work. Officer Breakiron reported that they both looked nervous. He asked them why they were in the parking lot together at that hour. Mr. Watkins replied that he had a room at the hotel, and Mr. Knicely said that he was thinking about getting a room. Officer Breakiron asked Mr. Watkins if he had his room key with him, and Mr. Watkins handed it to him. At that point, backup law enforcement arrived: Morgantown Police Officers Ammons and Helms. Officer Breakiron asked the suspects to step out of the

car, and Officer Helms conducted a canine sniff. The canine gave a positive identification. Officer Breakiron read the men their *Miranda* rights. Both indicated that they understood. Then Officer Breakiron and Officer Helms began to search the truck.

In the truck, the officers found three snorting straws, a grinder with a small amount of marijuana inside, a digital scale, several Xanax bars, .08 grams of crack cocaine, and 1.093 pounds of crystal methamphetamine. At this point, Officers Breakiron and Helms stopped the search, approached the suspects, and detained them. Officer Breakiron searched Mr. Watkins's person and located two cell phones, a hotel key card, and $7,609 in cash. The cash was divided by rubber bands into seven stacks of $1,000 and one stack of $500, and the rest was loose. Mr. Knicely was also searched; he had been carrying $211 and a cell phone. Both suspects were taken to the police department for questioning.

After the defendants were taken for questioning, the officers determined which hotel room was booked by Mr. Watkins. The officers obtained a search warrant for the room and made entry. In the hotel room, they identified a third individual named Willie Trapp, secured him, and searched the room. They found approximately 26 grams of assumed heroin, approximately 36

grams of crack cocaine, and over 6 pounds of methamphetamine. Officers also found 4 handguns. In addition, they seized a digital scale; $2,000 in cash; 125 suboxone strips; 2 bottles of unknown pills; Mr. Trapp's phone; and a small vial of white powder collected from the night stand located between the beds.

On November 6, 2018, the grand jury returned an 8-count indictment, naming Oscar Aaron Watkins, Douglas Charles Knicely, and Terry Willie Trapp as defendants. Mr. Watkins was charged in six counts: (1) Conspiracy to Distribute Controlled Substances, (2) Aiding and Abetting Possession with Intent to Distribute Methamphetamine, (3) Aiding and Abetting Possession with Intent to Distribute Heroin, (4) Aiding and Abetting Possession with Intent to Distribute Cocaine Base, (5) Distribution of Methamphetamine, and (8) Unlawful Possession of a Firearm. Mr. Knicely was only charged in 2 counts: (1) Conspiracy to Distribute Controlled Substances, and (6) Possession with Intent to Distribute Methamphetamine. Mr. Trapp was charged in five counts: (1) Conspiracy to Distribute Controlled Substances, (2) Aiding and Abetting Possession with Intent to Distribute Methamphetamine, (3) Aiding and Abetting Possession with Intent to Distribute Heroin, (4) Aiding and Abetting Possession with

Intent to Distribute Cocaine Base, and (7) Unlawful Possession of a Firearm.

II. PROCEDURAL HISTORY

A. Motions to Suppress

On January 4, 2019, Mr. Watkins filed a motion to suppress evidence seized as a result of his detention and search, along with any evidence seized as a result of subsequently obtained search warrants. Mr. Watkins argues in the motion that Officer Breakiron did not have the necessary reasonable suspicion to seize the defendants, noting that aside from the truck's presence in an area where drug deals are known to take place and his seeing a black man enter the passenger side of the vehicle, Officer Breakiron listed no evidence to support his belief that criminal activity was occurring or about to occur. Mr. Watkins argues that because his detention and the subsequent search were unconstitutional, the evidence resulting from them must be suppressed pursuant to the exclusionary rule. In response, the government argues that the seizure was justified due to the history of criminal activity in the parking lot and the oddness of two individuals sitting in the parking lot of a hotel at that hour of night.

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On January 10, 2019, Mr. Knicely filed a motion to suppress evidence as well. Mr. Watkins and Mr. Trapp joined this motion. In it, the defendants argue that Officer Breakiron lacked reasonable suspicion to detain them. The defendants write that Officer Breakiron observed "nothing more than a black man get into a vehicle in a hotel parking lot." Therefore, they argue, Officer Breakiron had no articulable facts to support reasonable suspicion for the seizure. In footnote 4 of the motion, defendants write that they were "clearly seized because the patrol cars blocked the entrance to the parking lot, as is clearly seen on Ptlm. Breakiron's body camera video," noting that "the men were plainly not free to -- and in fact were not *able* to –- leave." The defendants also argue that the body camera footage and physical evidence contradict a number of Officer Breakiron's claims: that he smelled marijuana, that the defendants appeared nervous, and that the defendants' stories were inconsistent. In response, the government, again, argues that the seizure was justified due to the history of criminal activity in the parking lot and the oddness of two individuals sitting in the parking lot of a hotel at that hour of night.

B. Supplemental Briefing

On January 31, 2019, after the motion to suppress hearing, the government filed a supplemental response. In this response, the government raised an argument it had not raised in its earlier briefs: that the initial interaction between Officer Breakiron and the defendants was a consensual "police-citizen encounter" for which the Fourth Amendment is not implicated and no reasonable suspicion is needed. The government argues that Officer Breakiron did not need to articulate reasonable suspicion to approach the defendants and talk to them. When Officer Breakiron approached and immediately smelled marijuana, he then had probable cause to search the vehicle.

On February 1, 2019, Mr. Knicely filed a supplemental brief. He argues that the encounter with Officer Breakiron was not consensual, that he was seized, and that there was no reasonable suspicion for the seizure. He argues that the characteristics of the parking lot make it clear that his ability to drive away was impossible. He also argues that there are many reasons why people might be out at 1:30 a.m. in Morgantown, that Euro Suites had not been established as a high crime area, that the officers' claims about smelling marijuana were not credible, and, again, that the video footage is

inconsistent with Officer Breakiron's claims that the defendants were nervous and shaking.

C. Report & Recommendation

On February 1, 2019, the Magistrate Judge issued an R&R on the motions to suppress, recommending that they be granted. He summarized the testimony from the witnesses at the motion hearing and found that the defendants were seized when Officer Breakiron entered the Euro Suites parking lot. He then found that Officer Breakiron did not have the requisite articulable, reasonable suspicion of criminal activity to seize them, and, therefore, the evidence obtained as a result of the seizure should be suppressed.

D. Objections & Responses

On February 5, 2019, the government filed objections to the R&R, specifically arguing that (1) the Magistrate Judge erroneously concluded that the encounter between Officer Breakiron and the defendants was not consensual, and (2) the Magistrate Judge erroneously concluded that Officer Breakiron blocked Mr. Knicely's vehicle. Mr. Watkins filed a response to the government's objections, arguing that the Magistrate Judge's factual findings were not clearly erroneous and that it is reasonable to assume the defendants did not feel free to leave.

He also argued that the *Leon* good faith exception does not apply. Mr. Knicely filed a reply to the government's objections, arguing that the R&R is well-supported and consistent with applicable precedent.

III. ANALYSIS

The Court has carefully reviewed the entire record, including all filings, videos, pictures, exhibits, briefs, and recordings from the motion hearing. In reviewing a Magistrate Judge's R&R, the district court reviews *de novo* all portions of it to which objections were made. The Court finds that the initial interaction between Officer Breakiron and the defendants was consensual in nature, and, therefore, no seizure occurred when Officer Breakiron parked in the hotel lot and approached the defendants' truck. Because no seizure occurred, no reasonable suspicion was needed. Once Officer Breakiron smelled marijuana, he had probable cause to search the defendants' vehicle.

A. NO SEIZURE OCCURRED WHEN OFFICER BREAKIRON ENTERED THE HOTEL PARKING LOT

The Fourth Amendment to the Constitution of the United States provides that "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated." U.S. CONST. AMEND. IV. To determine whether a

seizure has occurred, the proper inquiry is "whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect's position 'would have felt free to decline the officers' requests or otherwise terminate the encounter.'" *United States v. Sullivan*, 138 F.3d 126, 132 (4th Cir. 1998) (quoting *Florida v. Bostick*, 501 U.S. 429, 438 (1991)).

Some, but not all, police-citizen interactions rise to the level of a seizure. Generally, "[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *United States v. Drayton*, 536 U.S. 194, 200 (2002). As a general rule, police officers may approach individuals in parked cars and question the driver without implicating the Fourth Amendment. *See United States v. Lewis*, 606 F.3d 193, 197–98 (4th Cir. 2010). More specifically, "[p]olice-citizen encounters that are consensual require no justification, but those that are not consensual impose a detention on a citizen and so must be supported by an officer's reasonable, articulable suspicion." *United States v. Jones*, 678

F.3d 293, 299 (4th Cir. 2012) (citing *Bostick*, 501 U.S. at 434; *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

The Supreme Court of the United States has instructed that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry*, 392 U.S. at 19 n. 16. The Fourth Circuit has held that "when an officer blocks a defendant's car from leaving the scene," the police officer has demonstrated a "greater show of authority" than he would have shown by simply engaging in conversation. *United States v. Stover*, 808 F.3d 991, 997 (4th Cir. 2015).

The Fourth Circuit has also listed numerous factors to consider in determining whether a police-citizen encounter constitutes a seizure:

> the number of police officers present during the encounter, whether they were in uniform or displayed their weapons, whether they touched the defendant, whether they attempted to block his departure or restrain his movement, whether the officers' questioning was non-threatening, and whether they treated the defendant as though they suspected him of "illegal activity rather than treating the encounter as 'routine' in nature."

Jones, 678 F.3d at 299–300. The court also considers "the time, place, and purpose of the encounter, the words used by the

officer, the officer's tone of voice and general demeanor, [and] the officer's statements to others present during the encounter." *United States v. Weaver*, 282 F.3d 302, 310 (4th Cir. 2002).

If no physical force is applied, "a seizure requires both a 'show of authority' from law enforcement officers and 'submission to the assertion of authority' by the defendant." *Stover*, 808 F.3d at 995 (quoting *California v. Hodari D.*, 499 U.S. 621, 626 (1991)). Note that whether an encounter constitutes a seizure depends on the officer's objective behavior, not any subjective suspicion of criminal activity. *See Jones*, 678 F.3d at 203 n.5.

In determining whether a seizure occurred, many courts have analyzed the space between a police cruiser parked near a defendant's vehicle. A review of decisions by circuit courts of appeal indicates support for a finding that no seizure occurs when the defendant has space to drive away. *See United States v. Carr*, 674 F.3d 570 (6th Cir. 2012) (no seizure when police car parked at an angle approximately 12 feet from defendant and defendant had room to leave by driving forward or backward, even if it required "some maneuvering"); *United States v. Taylor*, 511 F.3d 87 (1st Cir. 2007) (no seizure when defendant could have

driven forward and turned left to exit the parking lot and "was not in fact hemmed from all sides"); *United States v. Barry*, 394 F.3d 1070 (8th Cir. 2005) (no seizure when police officer parked at least 15 feet from defendant's vehicle, did not activate emergency lights, and walked to the window to talk); *United States v. Ringold*, 335 F.3d 1168, (10th Cir. 2003) (no seizure when officer parked 15–20 feet from defendant at an angle, not blocking his path to exit, and walked to defendant to begin a conversation).

Here, the critical issue is whether the defendants were seized when Officer Breakiron parked his vehicle in the Euro Suites parking lot and walked toward the truck. Although this issue seemed to be an afterthought in the parties' original filings, they briefed the issue of seizure more substantively in their supplemental briefs following the motions hearing. It is well-established that a police officer may walk up to a car window and begin a conversation without implicating the Fourth Amendment. Therefore, the inquiry here must focus on the way Officer Breakiron parked his vehicle and the way he behaved when approaching.

Based on the Court's review of the record and the totality of the circumstances, the defendants had ample space to back out

of their parking spot and exit the parking lot at any time, even after Officer Breakiron parked his vehicle. The Court disagrees with the defendants' impressions of the video footage. Although exact measurements have not been presented to the Court as evidence, and it is impossible to glean them from the videos provided, the Court finds that the body camera footage clearly portrays enough space for Mr. Knicely's truck to back up and exit.[2] The government attached to its objections a screenshot from Officer Helms's body camera footage (Dkt. No. 107-1) that the Court finds quite compelling. Furthermore, at one point in the footage, Officer Breakiron walks back to the cruiser from the truck, and it takes him 14–15 steps to do so.[3] Both the body camera video footage and still pictures taken from that footage show that two patrol cars parked next to Officer Breakiron's vehicle after Officers Ammons and Helms arrived. Clearly, ample room existed between Officer Breakiron's patrol car and the defendants' truck to not only back out but also to exit the parking lot if the defendants so chose.

Both parties discuss *United States v. Jones* at length. In *Jones*, two police officers in a marked cruiser followed the

[2] The Court points to specific portions of Officer Breakiron's body camera footage that indicate that the defendant's truck could have exited the parking lot: 12:06, 18:04, 12:11, 24:06, and 24:12.
[3] He finishes his walk at 10:05 in his own body camera video (Gov. Exhibit 1).

defendant's car down a one-way street into private property and "blocked the car's exit." *Jones*, 678 F.3d at 295. The defendant had two options if he wanted to leave: go in the wrong direction on a one-way road or ask the officers to move their patrol car. *Id.* at 296. The police then approached the defendant and immediately asked him to lift his shirt. *Id.*

Jones is distinguishable from this case in a few ways. First, the *Jones* court takes for granted that the defendant's vehicle was blocked. There is no substantive analysis on that issue. Second, the *Jones* court specifically points out that the defendant *knew* he was being followed by the police. Here, while the defendants may have realized Officer Breakiron was walking toward the vehicle, they were not being followed and were unaware they were being watched for several minutes.[4] In addition, the defendants were not on a one-way street as they were in *Jones*. In fact, in contrast to *Jones*, the Court finds that they had a clear path to back out of their parking spot and drive away. Here, the situation is more like that in *United States v. Johnson*, in which the court distinguished the facts from *Jones* because the defendant's vehicle was not blocked, and

[4] The defendants' truck faced away from the hotel, and the defendants would have been facing away from Officer Breakiron's vehicle. Although not established in the record, the defendants may not have been aware of his presence until he stepped out of his vehicle.

he could have exited the parking lot. 2014 WL 5305731, at *11 (E.D. Va. Oct. 15, 2014).

Officer Breakiron testified that when he approached the truck, he talked to the defendants, introduced himself, and asked them what they were doing. Officer Breakiron was alone. Although the body camera was not turned on for the beginning of the encounter, the remainder of the video footage indicates that the interaction was polite and friendly in tone. There was no evidence of aggression or struggle. No evidence was submitted that Officer Breakiron drew his weapon, touched the defendants, or restrained their movements in any way. He did not turn on his blue lights. This situation could hardly be considered a "show of authority" by Office Breakiron. This was not a situation like *Jones* in which an officer approached and immediately did something intrusive. To the contrary, Officer Breakiron made casual conversation and smelled marijuana. Perhaps most importantly, there was no submission to authority by the defendants.

Officer Breakiron testified that while he was in the adjacent BB&T parking lot, he suspected that the individuals in the truck were engaged in a drug transaction or drug use. He was unclear in his testimony about whether he would have stopped the

defendants or simply talked to them had they attempted to drive away. It is important to note that Officer Breakiron's subjective thoughts -- along with hypothetical "what if" scenarios -- are irrelevant to the question of whether a seizure occurred. The test is whether a reasonable person in the defendants' situation would have felt free to terminate the encounter with the officer. The Court recognizes that citizens might feel uncomfortable in such a situation. But the Court also recognizes that "uncomfortable does not equal unconstitutional." *United States v. McCoy*, 513 F.3d 405, 411 (4th Cir. 2008).

Officer Breakiron's car was parked with ample space for the defendants to back out and drive away. No evidence of Officer Breakiron showing a display of force or restraint has been submitted. The Court finds that there was not the requisite show of authority or submission to authority to constitute a seizure. Thus, the Court finds that the defendants were not seized when Officer Breakiron parked his car. They were not seized until after he smelled marijuana.

B. OFFICER BREAKIRON HAD PROBABLE CAUSE TO SEARCH THE VEHICLE WHEN HE SMELLED MARIJUANA EMITTING FROM IT

Officer Breakiron had probable cause to search Mr. Knicely's truck as soon as he smelled marijuana. The Fourth Circuit has "repeatedly held that the odor of marijuana alone

can provide probable cause to believe that marijuana is present in a particular place." *United States v. Humphries*, 372 F.3d 653, 658 (4th Cir. 2004). It is well-established that the smell of marijuana emitting from a vehicle gives an officer probable cause to search the vehicle. *United States v. Scheetz*, 293 F.3d 175, 184 (4th Cir. 2002). This principle was very recently affirmed by the Fourth Circuit in *United States v. Radcliffe*, 2018 WL 6721420, at *2–3 (4th Cir. Dec. 21, 2018).

This Court is unconvinced by the defendants' contentions that Officer Breakiron's claims of smelling marijuana are unfounded. Even though no evidence of smoked marijuana was found in the truck, it is entirely possible that the smell of previously-smoked marijuana had lingered. Furthermore, a second officer testified that he smelled marijuana. The Court finds the defendants' investigator's testimony unconvincing as well and points out that the investigator smelled the grinder three months after this incident took place. The smell of marijuana in the truck could have easily come from another source. Regardless, when Officer Breakiron smelled marijuana, he had probable cause to search the vehicle.

IV. CONCLUSION

In summary, the Court finds that based on the totality of the circumstances, a reasonable person would have felt free to leave when Officer Breakiron entered the Euro Suites Hotel parking lot, and, therefore, the defendants were not seized at that time. When Officer Breakiron approached the driver's side window of the truck, he was engaging in a consensual police-citizen encounter. The moment he smelled marijuana, he had probable cause to search the vehicle. Therefore, the Court **REJECTS** Judge Aloi's R&R [Dkt. No. 105] and **DENIES** the defendants' motions to suppress evidence [Dkt. Nos. 58, 61].

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to counsel of record.

DATED: February 19, 2019

/s/ Thomas S. Kleeh
THOMAS S. KLEEH
UNITED STATES DISTRICT JUDGE